

1 IN THE UNITED STATES DISTRICT COURT

14:01:20

2 FOR THE DISTRICT OF ARIZONA

3 Barry Lee Jones,) 4:01-cv-00592-TMB
4)
5 Petitioner,)
6)
7 vs.)
8) Tucson, Arizona
9 Charles L. Ryan, et al.,) March 2, 2018
10) 2:01 p.m.
11 Respondents.)
12 _____)
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16

17 BEFORE THE HONORABLE TIMOTHY M. BURGESS, DISTRICT JUDGE

18 Transcript of Proceedings
19 Oral Argument
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23

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UNITED STATES DISTRICT COURT

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INDEX OF COURT PROCEEDINGS

| | PAGE |
|--|------|
| Argument by Petitioner - Mr. Sandman..... | 6 |
| Argument by Respondents - Mr. Braccio..... | 26 |
| Rebuttal Argument by Petitioner - Mr. Sandman..... | 62 |

P R O C E E D I N G S

(On the record at 2:01 p.m.)

THE COURT: Good afternoon. 14:01:21

MR. BRACCIO: Good afternoon, Your Honor. 14:01:24

THE COURT: So I take it you got the questions. And 14:01:28

so this is my proposal as to how we proceed. I've got my timer 14:01:33

set on 45 minutes for each of you. My thought is petitioners 14:01:42

will go first. You can reserve some time for rebuttal if you 14:01:47

want. Do you want to manage your own clock or would you like 14:01:52

me to give you a warning when you reach a particular point? 14:01:55

MR. SANDMAN: Your Honor, maybe around 30 minutes. I 14:01:59

do want to reserve some time. So if I start to go over -- 14:02:04

THE COURT: So you want to use 30 minutes. You want a 14:02:07

warning at the 15-minute mark, is that what you're saying? 14:02:10

MR. SANDMAN: No. I'm sorry, Judge. At the 30-minute 14:02:11

mark, I would like a warning if I am still -- 14:02:15

THE COURT: I think we've said the same thing in 14:02:15

different ways. 14:02:17

So when you have used 30 minutes, you would like me to 14:02:18

warn you that you've used 30 minutes. 14:02:22

MR. SANDMAN: Yes, sir. 14:02:24

THE COURT: Okay. Now we're on the same page. 14:02:25

Then we'll hear from respondents. You'll have your 45 14:02:27

minutes. 14:02:30

And then we'll go back to you for whatever rebuttal you 14:02:30

1 have. 14:02:35

2 I do want to -- because I just provided those questions to 14:02:36
3 you and did not put them on the record, I am going to just read 14:02:39
4 the questions now so that they're questions that are on the 14:02:45
5 record. 14:02:50

6 So I have, first, two questions for both parties. 14:02:51

7 One: Does the trial record that the prosecutor argued to 14:02:55
8 the jury that even if they didn't find Jones guilty on counts 14:02:59
9 other than count four that the jury could nonetheless find 14:03:04
10 Jones guilty on count four, and, if so, on the basis of what 14:03:09
11 evidence? 14:03:14

12 Question two: Explain or further elaborate on how law 14:03:14
13 enforcement's investigation is relevant or irrelevant to the 14:03:19
14 ineffective assistance of counsel claim. 14:03:23

15 And then three questions each for each side. 14:03:25

16 First, for petitioners: 14:03:28

17 One, assuming Jones wasn't involved in causing any of 14:03:30
18 Rachel's injuries, and assuming others put him on notice that 14:03:34
19 she was ill on May 1, why wasn't he on notice that she needed 14:03:37
20 to go to the hospital? 14:03:43

21 Two: Given that Jones does not dispute that he saw the 14:03:44
22 Lopez twins at the Choice Market on May 1 -- and I may need 14:03:49
23 some clarification on that issue -- why wasn't defense 14:03:55
24 counsel's investigation into the Lopez' twins testimony 14:04:01
25 minimally competent? 14:04:05

1 And three: Can you please respond to respondent's argument 14:04:06
2 that the Court should presume the trial counsel did not follow 14:04:10
3 up with Dr. Keen after August 4, 1994, for strategic reasons? 14:04:14

4 And then for respondents, three questions: 14:04:20

5 One: How do we know, given Arizona's non-unanimous jury 14:04:22
6 law, that any trial juror convicted Jones of felony murder 14:04:27
7 based on count four as the predicate? 14:04:32

8 Two: Does count four satisfy the Enmund -- I think it 14:04:38
9 was misspelled on the sheet that I handed you. It's 14:04:44
10 e-n-d (phonetic). -- Tison standard? 14:04:47

11 And finally, three: Why was it not deficient performance 14:04:51
12 of Jones' post-conviction counsel to request funding for an 14:04:58
13 investigator under the wrong rule and without supporting that 14:05:04
14 request? 14:05:08

15 So, those are the questions for counsel, and I am ready 14:05:09
16 when you are. 14:05:16

17 MR. SANDMAN: Your Honor, I think what I'd like to do 14:05:39
18 is try to address your questions first. And I may have some 14:05:41
19 things to interject while answering those questions, but I 14:05:46
20 think I'd like to work my way through those. 14:05:50

21 THE COURT: Sure. 14:05:52

22 MR. SANDMAN: Starting with question one, the answer 14:05:53
23 is no to question one. 14:05:55

24 In other words, the prosecutor never argued to the jury 14:05:58
25 that if they didn't find Jones guilty on the counts other than 14:06:02

1 count four that the jury could nonetheless find him guilty on 14:06:06
2 count four. 14:06:10

3 The argument to the jury was that Mr. Jones had failed to 14:06:10
4 provide medical care or take Rachel to the hospital to conceal 14:06:19
5 his own wrongdoing as the rapist and person who assaulted 14:06:22
6 Rachel. So the argument was Mr. Jones is the perpetrator, he 14:06:28
7 wanted to conceal his wrongdoing, and therefore withheld care. 14:06:35
8 So that was the argument. There wasn't any kind of 14:06:41
9 alternative. 14:06:44

10 Number two, explain or further elaborate on how law 14:06:45
11 enforcement investigation is relevant or irrelevant. 14:06:51

12 You know -- 14:06:55

13 THE COURT: That's a pretty big question. 14:06:56

14 MR. SANDMAN: It is. So let me just digress for a 14:06:59
15 moment to talk about the overall ability to impeach the state's 14:07:02
16 case, including the law enforcement investigation. 14:07:07

17 But let's start with Dr. Howard, who testified at 14:07:10
18 Mr. Jones' jury trial. He testified that all of the injuries 14:07:18
19 took place or gave -- basically provided testimony so the jury 14:07:22
20 would conclude that all the injuries took place on the day 14:07:27
21 prior. 14:07:32

22 Dr. Howard had testified at the Gray trial just only a 14:07:34
23 couple weeks earlier, and he testified there in response to a 14:07:37
24 question: How long would the scalp injury have been painful to 14:07:42
25 Rachel? He said several days. 14:07:47

1 So we know in front of the Gray jury he is indicating that 14:07:49
2 that wound to the scalp had been there for several days before 14:07:55
3 her death. Because obviously if it's painful, for several days 14:07:59
4 it exists. 14:08:02

5 THE COURT: Couldn't he have been talking, speaking 14:08:03
6 hypothetically, that type of wound could be painful for several 14:08:06
7 days? 14:08:08

8 MR. SANDMAN: He wasn't asked a hypothetical question. 14:08:10
9 It was Rachel's -- this wound to this child. We pin cite that 14:08:12
10 in our brief. 14:08:17

11 He was also asked on cross-examination at the Gray 14:08:18
12 trial questions about the timing of the small bowel injury, and 14:08:22
13 he said that the injury was most consistent with infliction 24 14:08:25
14 hours prior to death. Which, of course, is prior to the Sunday 14:08:29
15 afternoon when Mr. Jones had sole care of her. 14:08:35

16 He then was asked the same question by the prosecutor 14:08:38
17 at the Jones trial in front of that jury, and the question 14:08:42
18 was -- and this was at Page -- it's Exhibit 47 at Page 148: 14:08:48
19 What is the most consistent with when this blow to the small 14:09:00
20 bowel would have occurred to Rachel? 14:09:05

21 There is only one truthful answer to that, given what 14:09:07
22 he's testified to two weeks earlier: It was most consistent 14:09:10
23 with 24 hours. But he doesn't say that, and he ends up 14:09:13
24 testifying that the injuries were consistent with the afternoon 14:09:17
25 prior, when the child was with Mr. Jones. 14:09:20

1 And the same thing with the vaginal injury, you can 14:09:24
2 work through things. 14:09:28

3 So there's that impeachment of the state's case. 14:09:28

4 Now, they have a star witness at the trial, Becky, who 14:09:33
5 is Rachel's sister, who testifies that Mr. Jones went off on 14:09:39
6 three trips with Mr. Jones on Sunday afternoon and that she was 14:09:46
7 fine after the first two trips. But then Becky says: I didn't 14:09:52
8 see her after the third trip. So that was the vehicle, that 14:09:55
9 third trip was the vehicle for when this assault occurs. 14:09:59

10 Once again -- and by the way, you know, Mr. Bruner, 14:10:06
11 the trial lawyer, had all the impeachment available to impeach 14:10:11
12 Dr. Howard with his changes in testimony. He also had in his 14:10:15
13 file Becky's prior statements, including her sworn testimony at 14:10:20
14 her mother's trial, the Gray trial, two weeks earlier, where 14:10:23
15 she said: On each and every occasion my sister went off with 14:10:27
16 Mr. Jones twice, she came back fine both times. 14:10:30

17 Now, we all know she wasn't fine because she had a 14:10:35
18 small bowel injury that no one knew about, and she was dying, 14:10:39
19 would die from that in a number of hours. But the point is, is 14:10:42
20 that there isn't any opportunity for this crime to have 14:10:44
21 occurred if she is impeached with those prior statements. 14:10:47

22 Then we get to Detective Pesquiera and the law 14:10:54
23 enforcement. And we know, number one, when she testifies in 14:10:59
24 front of the grand jury, she is asked, you know, questions 14:11:02
25 about when Mr. Jones would have had the opportunity to do this, 14:11:06

1 and she is asked how did Rachel look after the second trip in 14:11:11
2 the van with Mr. Jones on that Sunday. And she had Rachel -- 14:11:14
3 excuse me -- Becky's interviews. In fact, she was using the 14:11:22
4 interview to Detective Downing, that Becky gave to Detective 14:11:26
5 Downing, to guide her grand jury testimony. And rather than 14:11:30
6 telling the grand jury the truth about what Becky saw 14:11:33
7 concerning Rachel after the second trip, which is Rachel was 14:11:39
8 absolutely fine, she said, untruthfully: Oh, Becky never saw 14:11:43
9 her after the second trip. 14:11:47

10 That wasn't true. So she was never impeached with 14:11:50
11 that. And she was never impeached with respect to what 14:11:58
12 I would consider a fatal flaw in her entire investigation. 14:12:04

13 You know, she comes to the conclusion that these injuries 14:12:09
14 would had to have been inflicted on Sunday afternoon, some 14:12:12
15 short hours before the child died, based on her own assumption. 14:12:17

16 THE COURT: Well, didn't she interview...was it a 14:12:22
17 Ms. Toley (phonetic)? 14:12:29

18 MR. SANDMAN: Ms. Tafe? 14:12:30

19 THE COURT: Tafe. Tafe. And didn't Ms. Tafe tell her 14:12:32
20 that she thought that Rachel showed signs of illness on the 14:12:37
21 30th? 14:12:41

22 MR. SANDMAN: On Saturday. 14:12:42

23 THE COURT: Correct. And my question then is this: 14:12:44
24 Was that in her report? 14:12:47

25 MR. SANDMAN: Yes. 14:12:52

1 But when I questioned -- I believe the answer is yes. 14:12:56

2 And when I questioned Ms. Pesqueira about that, she said: 14:13:00

3 Well, I disregarded that because I knew this assault happened 14:13:05

4 on Sunday, and so I assumed that Ms. Tafe was mistaken. 14:13:11

5 So why does she assume -- she assumes the witness is 14:13:16

6 mistaken because she's decided, without any independent medical 14:13:19

7 investigation, that these injuries had to have happened on that 14:13:23

8 Sunday afternoon. She totally disregarded that. She didn't 14:13:26

9 provide that information to Dr. Howard. 14:13:29

10 Now, if the lawyers are playing with a full deck -- and I 14:13:32

11 think we already know they're not because they're not even 14:13:36

12 using available evidence to impeach Becky and Dr. Howard -- and 14:13:38

13 because they are not playing with a full deck, they don't know 14:13:44

14 that all these injuries did not occur on Sunday. 14:13:48

15 So my contention is when the lawyer knows, as I know 14:13:53

16 through expert evaluation from the likes of Dr. Ophoven and 14:13:59

17 McKay and Dr. Keen, I know these injuries didn't happen, and if 14:14:04

18 we were now in Mr. Jones' jury trial and I put on those 14:14:09

19 experts, I would have obviously impeached Ms. Pesquiera 14:14:13

20 regarding her medical investigation, which really never 14:14:18

21 existed. 14:14:23

22 And you combine her failure to investigate with the fairly 14:14:23

23 loose dealings that the prosecutor had with Dr. Howard and 14:14:29

24 Becky to manipulate, you know, their testimony between these 14:14:32

25 two trials, then if I'm trying this case before Mr. Jones' 14:14:34

1 jury, I'm going to -- I'm really going to go after Detective 14:14:40
2 Pesquiera on her evaluation of the blood evidence. 14:14:47

3 They charged Mr. Jones with a rape and assault on a Sunday 14:14:51
4 and the next day Rachel dies. They know what he's wearing on 14:14:56
5 Monday, the day she dies. They make no effort to identify 14:15:01
6 either the child's clothing or Mr. Jones' clothing. 14:15:05

7 That's the sort of impeachment I would have done. I did it 14:15:12
8 when she testified in these proceedings. And she had to 14:15:15
9 concede that, for all we know, there could have been 14:15:18
10 exculpatory evidence on the clothing Rachel wore, on the 14:15:22
11 clothing Mr. Jones wore on the day of the assault. 14:15:26

12 So, for example, maybe there was no blood on the clothing 14:15:30
13 that Mr. Jones wore on Sunday, which would absolutely inform us 14:15:32
14 that the blood he had on his clothes on Monday came from 14:15:39
15 attending to what turned out to be a dead child that they were 14:15:41
16 getting to the hospital. 14:15:46

17 She could identify no case -- and she was in sexual assault 14:15:48
18 cases forever -- where there had been neglect to identify the 14:15:53
19 victim's clothing worn at the time of the alleged assault 14:15:56
20 except this case. Because in this case she knew Mr. Jones was 14:16:00
21 guilty based on essentially nothing, and didn't need to 14:16:04
22 investigate anything. 14:16:06

23 Then if the trial lawyers were doing their job they would 14:16:10
24 have presented her with evidence, information, that Rachel's 14:16:24
25 mother was a serial abuser of her children; that she has had a 14:16:29

1 record of throwing them down stairs, hitting them in the 14:16:35
2 stomach -- of course, Rachel had a stomach injury -- and she 14:16:38
3 would have been queried as to: Why didn't you -- shouldn't you 14:16:45
4 have investigated Rachel's mother as the perpetrator of these 14:16:48
5 assaults? And she agreed when she testified at this hearing: 14:16:53
6 You know, if I had known all this, I would have investigated. 14:16:57
7 Well, Mr. Jones' trial lawyer should have made sure she knew 14:17:00
8 about it. 14:17:05

9 THE COURT: But we're talking about several types of 14:17:06
10 injuries now, so can you be a little more specific? Because 14:17:09
11 we've got the laceration on the scalp, we've got the injury to 14:17:12
12 the small intestine, and then we have the sexual assault. 14:17:15

13 MR. SANDMAN: So I was not referring to the sexual 14:17:19
14 assault injury. 14:17:21

15 THE COURT: Okay. Thank you. 14:17:21

16 MR. SANDMAN: But as we made Detective Pesqueira aware 14:17:23
17 of at the hearing, and the trial lawyers I think if they were 14:17:30
18 doing their job, should have done this: 14:17:33

19 The defense lawyers obtained information that Rachel's 14:17:35
20 older brother, teenage brother, Johnny, had to be removed from 14:17:41
21 Rachel's bedroom because of suspicions of improper sexual 14:17:45
22 touching. Now, not of Rachel. 14:17:49

23 We don't know that. We only know that Barry built a little 14:17:52
24 add-on for Johnny and removed him from that room because there 14:17:57
25 was evidence that he had been touching Brandie, Barry's 14:18:01

1 daughter. 14:18:06

2 But then we also know, from trial lawyers' notes, that 14:18:07

3 there were sexual issues between Johnny and Rachel that were 14:18:12

4 not -- apparently not ever investigated. 14:18:16

5 But Detective Pesqueira admitted when she testified here 14:18:19

6 that she would have investigated these issues regarding Johnny 14:18:24

7 and Rachel if she had known about it. Well, she should have 14:18:29

8 known about them, and defense counsel should have made her 14:18:32

9 aware of this information. 14:18:35

10 THE COURT: What about Zolie? 14:18:38

11 MR. SANDMAN: You know, Zolie was still having contact 14:18:43

12 with these children. He was at Rachel's birthday party. 14:18:45

13 Angela, in her interview, said that he was a frequent visitor 14:18:51

14 to the trailer where they were living. Presumably not -- when 14:18:55

15 Mr. Jones wasn't there. Certainly, he should have been 14:18:57

16 investigated, and, of course, we know that never happened. 14:19:00

17 So I think all those -- you know, when you look at the 14:19:03

18 state's case, everybody -- they could have impeached her. You 14:19:07

19 know, Becky and Dr. Howard and the police investigation. 14:19:13

20 And then of course we get to the -- I'll come back to the 14:19:16

21 Lopez twins, because you have a question on that. 14:19:19

22 The next question: Assuming Jones wasn't involved in 14:19:21

23 causing any of Rachel's injuries and others put him on notice 14:19:29

24 that she was ill on May 1st, why wasn't he on notice that she 14:19:32

25 needed to go to the hospital? 14:19:37

1 I want be careful on answering this question because.... 14:19:40

2 Let me say it this way: I think there wasn't really direct 14:19:49

3 testimony on that at the trial. There was a lot of witness 14:19:56

4 statements, which the respondents have cited in their briefs, 14:20:01

5 where they report that people told the police that they had 14:20:06

6 told Jones that Rachel was ill and probably needed to get 14:20:11

7 medical treatment. 14:20:14

8 But it wasn't presented at the trial because -- I don't 14:20:15

9 know for sure "because." But they didn't need to present it 14:20:18

10 because the theory was Jones was the killer, and he would have 14:20:21

11 known she needed to go to the hospital for that -- 14:20:24

12 THE COURT: Let me reframe the question for you a 14:20:26

13 little bit. 14:20:29

14 Did the state ever argue at trial that even if Jones did 14:20:30

15 not commit these injuries, he still had a responsibility and 14:20:35

16 should have been on notice to take her to the hospital? 14:20:41

17 MR. SANDMAN: No. No. 14:20:43

18 THE COURT: Was the theory of the state -- I just want 14:20:46

19 to make sure I understand correctly. Was the theory of the 14:20:48

20 state at trial that these charges were all intertwined? 14:20:51

21 MR. SANDMAN: The evidence was and the argument was he 14:21:00

22 did it. He knew she obviously needed medical treatment but 14:21:02

23 concealed it to cover up his own crime. It was as simple as 14:21:05

24 that. 14:21:10

25 They didn't need to -- you know, they had him dead to 14:21:10

1 rights as being the rapist and the assaulter, you know, the 14:21:16
2 person who assaulted her. And so that was the evidence. 14:21:21

3 There was never any kind of alternative, well, if he's 14:21:27
4 still guilty, it would be for these reasons. It was all 14:21:30
5 intertwined with his guilt for the actual assault. 14:21:33

6 I do want to say, Judge, on the topic of count four, you 14:21:39
7 know, the state alleges, well, there was no way to defend that, 14:21:51
8 other than arguing that Jones wasn't the legal custodian, and 14:21:53
9 he lost that legal argument. But obviously we disagree with 14:21:57
10 that. I mean, you had to defend count four the way you would 14:22:02
11 have defended counts one, two, three, and five. I mean, the 14:22:06
12 defense is he is innocent. 14:22:11

13 Now, is there still an argument under count four that he is 14:22:14
14 criminally negligent? Or, as in the case of Angela, that he 14:22:20
15 had a reckless mental state? Because obviously that night her 14:22:24
16 head was bleeding, she was vomiting. 14:22:28

17 There is an issue there for the jury to decide. They 14:22:34
18 weren't presented with that, with that alternative. In other 14:22:37
19 words, it wasn't the case where there was, well, if he's not 14:22:41
20 guilty of this, he's guilty of that. 14:22:46

21 But I think, in all candor, Dr. McKay and Dr. Ophoven 14:22:49
22 thought there was medical neglect, but a negligence state of 14:22:55
23 mind. 14:23:00

24 And the jury was actually instructed on lesser included. 14:23:00
25 They were instructed that "criminal negligence" means with 14:23:06

1 respect to a result and -- excuse me. "Criminal negligence" 14:23:09
2 means, with respect to a result or circumstance, that a person 14:23:16
3 fails to perceive a substantial and unjustifiable risk that the 14:23:19
4 result will occur or that the circumstance exists. The risk 14:23:24
5 must be of such a nature and degree that the failure to 14:23:29
6 perceive it constitutes a gross deviation from the standard of 14:23:33
7 care that a reasonable person would observe. 14:23:37

8 So it's an objective test. The risk must be of such a 14:23:39
9 degree that the failure to perceive it constitutes a gross 14:23:47
10 deviation. 14:23:50

11 So that's like he's going to be judged the way a reasonable 14:23:51
12 man would be judged. Whereas -- and if he was found guilty of 14:23:53
13 that, it's a class four felony, and probation eligible, and 14:23:57
14 short prison term, or whatever. 14:24:01

15 So it's not a death penalty case or a murder case. Because 14:24:02
16 a murder case, felony murder requires they prove intent, and 14:24:07
17 the jury was instructed that "intentionally" means a person's 14:24:11
18 objective is to cause the result. 14:24:16

19 So, you know, if Jones is the perpetrator and he's 14:24:19
20 withholding medical care, you know, it sounds to me like that's 14:24:23
21 intent, because he is motivated to hide, disguise his own 14:24:28
22 wrongdoing. 14:24:33

23 I guess, in short, what I am saying is that maybe there's a 14:24:34
24 lesser included offense that the jury may have considered, but 14:24:40
25 I don't think there is any reasonable likelihood that the jury 14:24:43

1 convicts him of felony murder, and the more serious intentional 14:24:47
2 or knowing child abuse, if he is not the perpetrator. I mean, 14:24:51
3 he's not the killer then. 14:24:59

4 I think they would probably say, if anything, you should 14:25:01
5 have known better to get her care. And that's criminal 14:25:03
6 negligence or, at worst, recklessness, which would render him 14:25:07
7 not eligible for a felony murder charge. 14:25:13

8 The next question: Given that Jones does not dispute that 14:25:15
9 he saw the Lopez twins at the Choice Market, why wasn't defense 14:25:20
10 counsel's investigation into the Lopez twins' testimony 14:25:25
11 minimally competent? 14:25:28

12 Now, in answering that question, I think you have to look 14:25:30
13 at the broader picture of what these lawyers knew. Because, 14:25:36
14 sure, they know that Mr. Jones was at the Choice Market on the 14:25:43
15 late afternoon of Sunday. But they also know that, according 14:25:49
16 to Becky, until Mr. Jones' trial, she insists that when 14:25:53
17 Mr. Jones came back from the market, Rachel looks fine. 14:25:57

18 Now, that's important. Because, you know, part of what the 14:26:01
19 Lopez twins are saying that they allegedly saw was a child 14:26:05
20 crying, being beaten in the face, with red on her face. Well, 14:26:10
21 he returns from the market and she doesn't look like she's been 14:26:15
22 beaten in the face. 14:26:21

23 And then a little after 5:00 o'clock that day, when Rachel 14:26:22
24 is found sick at Stephanie Fleming's house -- she's already 14:26:25
25 feeling the effects of the peritonitis -- she is seen by 14:26:30

1 Stephanie Fleming, Dawn Kopp, and another individual who was 14:26:34
2 with Ms. Kopp; they don't see any marks on her face that would 14:26:39
3 indicate she had a beating about the face earlier that 14:26:44
4 afternoon. 14:26:48

5 They also don't notice, by the way, her head bleeding. 14:26:48
6 Which is very, very important. 14:26:52

7 Because, you know, this head injury, according to the 14:26:53
8 state's theory, happens at the same time she receives her other 14:26:57
9 injuries. But when she is seen, already sick from peritonitis, 14:27:00
10 at 5:00 o'clock, her head is not seen bleeding. And when 14:27:04
11 Detective Pesquiera interviewed Ms. Fleming, at the end of May, 14:27:09
12 '94, she specifically asked her: Did you see her head 14:27:14
13 bleeding? And she said: I looked and it wasn't. 14:27:18

14 Now, that's important. Because now it sounds to me like 14:27:21
15 we're looking at an injury that Dr. Ophoven described, an older 14:27:25
16 injury that starts to rebleed later that day due to shock from 14:27:30
17 peritonitis, and actually would be consistent with Dr. Howard's 14:27:34
18 view at least the first few times, couple times he spoke about 14:27:38
19 it, that this injury was several days old and now it's 14:27:42
20 reopening later that day, much later after she gets sick, when 14:27:46
21 Mr. Jones brings her back from the Flemings' and he lays her 14:27:50
22 down and he finds blood on the pillow. 14:27:55

23 THE COURT: Is the premise of my question though, 14:27:57
24 question number two, correct? That Mr. Jones doesn't dispute 14:28:02
25 seeing the Lopez twins? I want to make sure I ask -- 14:28:06

1 MR. SANDMAN: He does -- well -- 14:28:10

2 THE COURT: -- correct. 14:28:10

3 Did he make a statement of some sort -- 14:28:10

4 MR. SANDMAN: There is nothing -- there is a record in 14:28:14
5 the -- that I think Mr. Jones provided to Mr. Gruen or somebody 14:28:18
6 that he thought he saw them at another location in the parking 14:28:27
7 lot. So there was -- it wasn't presented at the trial, but 14:28:30
8 there is -- to answer your question directly, there is that in 14:28:36
9 the record, where he said he saw them in a different location 14:28:39
10 in that same parking lot. 14:28:42

11 But part of the direction I was going is that the 14:28:45
12 lawyers know all these things that already suggest this child 14:28:48
13 has come back from the market, she is already sick from 14:28:52
14 peritonitis, her head is not -- her face doesn't indicate that 14:28:55
15 it's been beaten on. 14:28:59

16 And then on top of that, nobody ever goes to the 14:29:01
17 Choice Market to follow up on was Mr. Jones there at the same 14:29:09
18 time as these children. He says he was, and that Rachel went 14:29:12
19 in the store. 14:29:15

20 I asked Detective Pesqueira about that. This is more 14:29:17
21 impeachment. I said that's someplace the police had to go on 14:29:21
22 May 2nd to check on Mr. Jones' story. And she said: We sure 14:29:26
23 did. And I said maybe Detective Ruelas went there and he 14:29:30
24 actually found exculpatory information that Jones was there 14:29:36
25 doing -- not to beat her at the market, but he went in shopping 14:29:39

1 with Rachel and she was fine. And she pretty much had to 14:29:44

2 concede: Well, we don't know now about that either. 14:29:47

3 But the bigger point is, is having all these flags 14:29:50

4 that the Lopez story doesn't add up. That she doesn't look 14:29:54

5 like she's beaten in the face when she gets home. 14:29:58

6 The lawyers testified in these proceedings that they never 14:30:00

7 believed that the Lopez children could see what they reported, 14:30:03

8 given the size of the children and the size of the van and the 14:30:06

9 six-foot-wide length between the doors, passenger and driver's 14:30:09

10 doors. So that's their operating theory, is that the children 14:30:16

11 couldn't see it. 14:30:22

12 And so my answer to your question is, if that's your theory 14:30:23

13 as a defense lawyer, you should investigate that. 14:30:27

14 And they did. 14:30:30

15 A few days before the start of the trial, they got George 14:30:35

16 Barnett, their investigator, to measure the van. But that was 14:30:40

17 a partial, incomplete, useless investigation because it didn't 14:30:43

18 take into account the size of the children, Mr. Jones' reach, 14:30:46

19 the line of sight of the children. I mean, they had nothing. 14:30:51

20 So they didn't even make use of those measurements. 14:30:55

21 So, you know, they did -- in *Strickland* parlance, they 14:30:59

22 didn't have a reason to stop investigating that. Obviously, 14:31:05

23 they should have started investigating that months earlier. 14:31:09

24 And they knew about -- those missing components of the size 14:31:14

25 of the children were important. Because when Ms. Bowman 14:31:17

1 interviewed Ray, she said: How tall are you? And he said: I 14:31:22
2 don't know. And she said: We'll look into that. 14:31:28

3 But they never did look into it. 14:31:31

4 And similarly, Sean Bruner testified in these proceedings 14:31:33
5 he thought the children's statements were unreliable, perhaps 14:31:39
6 influenced by their mother, and no investigation to confirm 14:31:42
7 their own hypothesis. 14:31:46

8 Even though we had testimony from Dan Cooper and from 14:31:49
9 Dr. Esplin that at the time of this trial reasonable lawyers 14:31:55
10 knew that methods for investigating and interviewing children 14:31:59
11 were critical. Dr. Esplin was testifying in cases back then, 14:32:03
12 giving seminars. Mr. Cooper actually hired -- had hired 14:32:08
13 Dr. Esplin in that time frame. 14:32:12

14 And so I am judging what they didn't do based on their 14:32:14
15 failure to follow through on their own operating theories for 14:32:19
16 the defense. I mean, what good is an operating theory if 14:32:22
17 you -- I don't think the kids could see but then I don't 14:32:27
18 investigate that? 14:32:30

19 Just to make one final point. 14:32:33

20 THE COURT: Yes. 14:32:34

21 MR. SANDMAN: That is, Mr. Bruner, when he had Ray 14:32:36
22 Lopez in front of the jury, he said: Well, Ray, how -- he 14:32:41
23 again asked: How tall are you? Do you think you could have 14:32:44
24 seen in that van? And Ray said: Yep, I sure could. 14:32:47

25 That wasn't very effective because he wasn't prepared. 14:32:51

1 I don't know if you had a question, Judge. 14:32:55

2 THE COURT: No. Just, with the remaining time, you've 14:32:56
3 got a little over 17 minutes left, and I was hoping to have you 14:32:59
4 focus on the Dr. Keen question. 14:33:04

5 MR. SANDMAN: Well, that is important, and I will do 14:33:08
6 that. 14:33:10

7 Respondents cite a lot of AEDPA cases. You know, 14:33:10
8 under the AEDPA, the limited -- which require this Court and 14:33:20
9 other federal courts to engage in a very limited review of 14:33:26
10 cases that have been decided in the state courts. 14:33:31

11 AEDPA doesn't apply in this case. This is a de novo 14:33:35
12 hearing. There was no prior state court decision. So when 14:33:39
13 they cite *Richter* and *Pinholster* and these other cases, you 14:33:42
14 should ignore those, they have no application to a de novo 14:33:46
15 review by a federal judge. 14:33:50

16 That brings us back to the *Strickland* test, to answer your 14:33:51
17 question. 14:33:55

18 Before you presume anything about strategy, the *Strickland* 14:33:59
19 question is, or the question the Court must ask is, whether 14:34:02
20 defense counsel conducted a reasonable investigation or made 14:34:09
21 reasonable decisions that make investigations unnecessary. 14:34:12

22 If they have done that -- because that's what *Strickland* 14:34:18
23 requires, reasonable investigation, or a reasonable decision 14:34:23
24 not to investigate -- they can have whatever strategy they 14:34:25
25 want. 14:34:29

1 If they haven't done that, if they haven't conducted a 14:34:29
2 reasonable investigation, or made a reasonable decision not to 14:34:32
3 investigate, that's ineffective assistance. 14:34:36

4 And in this case they couldn't conceivably have a strategy 14:34:40
5 to cut off Dr. Keen, or any other doctor, until they got an 14:34:44
6 answer to a fundamental question from somebody, and that was: 14:34:49
7 When did these injuries happen? 14:34:54

8 We know that they asked Dr. Keen that question. We also 14:34:55
9 know that he never answered it. For several reasons. 14:34:58

10 Number one, we know the question was not answered because 14:35:02
11 if he had answered it he would have testified at Mr. Jones' 14:35:04
12 jury trial that these injuries -- I mean all of them -- didn't 14:35:08
13 happen the day prior. 14:35:12

14 Dr. Keen testified at the hearing that the small bowel 14:35:15
15 injury didn't happen the day before; and the vaginal injury, he 14:35:21
16 agreed with Dr. Ophoven, was an older injury. 14:35:24

17 So if they asked him -- and they did ask the right 14:35:27
18 question; but if he answered it, we wouldn't be here today. 14:35:30

19 THE COURT: Wasn't there some phone call between 14:35:33
20 counsel and Dr. Keen? 14:35:36

21 MR. SANDMAN: There was a phone call. But Dr. Keen 14:35:38
22 testified that he couldn't have opined on the timing of the 14:35:42
23 injuries without reviewing the slides, the tissue slides from 14:35:49
24 the autopsy and the photographs. And we know again, for two 14:35:53
25 reasons, that that never happened. 14:35:58

1 Number one, the medical examiner's file does not 14:35:59
2 contain a transmission to him of that information. And it has 14:36:02
3 transmission, confirming transmission, to everyone else who's 14:36:06
4 looked at them. And as Dr. Keen testified, at Maricopa County, 14:36:10
5 where he worked, they documented everywhere those tissue slides 14:36:14
6 went, and they did not go to Dr. Keen in this case. 14:36:19

7 Secondly, we know if he had reviewed the tissue 14:36:21
8 slides, again, we wouldn't be here. We wouldn't have an 14:36:25
9 ineffective assistance claim. Because when Dr. Keen looks at 14:36:28
10 the data, he's told us the prosecutor theory was wrong. 14:36:33

11 THE COURT: So you're at 14 minutes. 14:36:37

12 MR. SANDMAN: I do want to say something else about 14:36:39
13 why they had to investigate this medical injury. They had to 14:36:44
14 get someone to answer that question. 14:36:48

15 The respondents have said, well, Dr. Keen didn't ask for 14:36:50
16 the slides. Maybe he didn't ask for them. But the lawyers 14:36:54
17 knew the slides had to be reviewed. Because Mr. Bruner said 14:36:58
18 that at a July 1994 hearing, that he needed someone to review 14:37:02
19 the slides. They had an article in their file, science article 14:37:06
20 in the file, saying the slides had to be reviewed. Dr. Howard, 14:37:09
21 in his interview, pretrial interview, was basing all of his 14:37:13
22 timing opinions on review of the slides. 14:37:17

23 They knew that the slides had to be reviewed, and they 14:37:19
24 needed to ask him or someone to look at them. It wasn't up to 14:37:22
25 them to sit back and wait for someone to ask a question about 14:37:26

1 needing to look at them. 14:37:30

2 For all we know, in that phone call they may have only 14:37:32

3 talked about the need for an additional autopsy. Because at 14:37:36

4 that same July 1994 hearing, it's Exhibit 24D, Judge, there was 14:37:40

5 a big to-do about the fact that going on three months from the 14:37:44

6 child's death, Mr. Bruner had a hold on the body. And the 14:37:49

7 judge was very upset and he said: I want you to get somebody 14:37:54

8 and you tell us whether that autopsy needs to be redone. 14:37:57

9 So they had that August conversation with Dr. Keen, and 14:38:01

10 then you'll see -- we have exhibits that show that right after 14:38:06

11 that, Bruner released the body and then they didn't do anything 14:38:09

12 else. 14:38:14

13 And not doing anything else was the story here. 14:38:15

14 Not impeaching Becky. Not impeaching Dr. Howard. Not 14:38:18

15 following up on their own theories of why the Lopez children 14:38:21

16 statements were unreliable. Not following up with Dr. Keen. 14:38:25

17 Basically, you know, getting rid of their fact investigator 14:38:28

18 after just a few days, other than calling him back to measure 14:38:33

19 the van. I mean, doing nothing is the operative theme in this 14:38:36

20 case. They did nothing, and you can see what the result was. 14:38:40

21 I'll reserve the rest of my time. 14:38:47

22 THE COURT: Thank you. 14:38:49

23 All right. Mr. Braccio. 14:38:50

24 MR. BRACCIO: May it please the Court, opposing 14:38:54

25 counsel, Mr. Sandman, Ms. Smith, Myles Braccio on behalf of the 14:39:16

1 Arizona Attorney General's Office for respondents. 14:39:20

2 I'd like to thank the Court for coming down. I know the 14:39:22

3 Court is very busy, and this is a lot of time and energy to 14:39:25

4 come all the way down here. We sincerely appreciate it. 14:39:28

5 I'd like to begin by letting the Court know I've prepared a 14:39:30

6 PowerPoint presentation, and the first couple of slides, I 14:39:34

7 think, are going to get right to this Court's questions. Or 14:39:37

8 question one for petitioner and respondent, as well as question 14:39:39

9 one for respondent. I'll answer those questions directly. 14:39:43

10 The answer is the prosecutor absolutely did not intertwine 14:39:46

11 these, and I am going to show the Court. 14:39:49

12 THE COURT: While you're doing that, do you want a 14:39:51

13 warning when you have a certain amount of time left? 14:39:54

14 MR. BRACCIO: That would be great, Your Honor. Maybe 14:39:56

15 at five minutes. 14:39:58

16 THE COURT: You've got it. 14:39:59

17 MR. BRACCIO: Okay. In this case there were three 14:40:00

18 predicates for the felony murder. The first being the sex 14:40:03

19 assault of a minor under the age of 15, which was count one; 14:40:06

20 the second being the child abuse count for causing the ruptured 14:40:09

21 duodenum and internal injuries; and the third being the child 14:40:14

22 abuse for Jones' failure to seek medical aid for Rachel prior 14:40:17

23 to her death. 14:40:20

24 Now, Jones must prove, under *Gallegos*, a Ninth Circuit 14:40:21

25 law, that his trial counsel were constitutionally ineffective 14:40:26

1 for failing to investigate and present evidence undermining 14:40:27
2 each of these predicate felonies. 14:40:29

3 As we've argued, Jones has presented no evidence in 14:40:32
4 these proceedings whatsoever that his counsel were ineffective 14:40:34
5 for failing to investigate and challenge his child abuse 14:40:38
6 conviction for failing to seek medical care for Rachel. 14:40:40

7 This count is unrelated to the timing and nature of the 14:40:44
8 injuries, as well as the identity of the assailant. 14:40:47

9 Now, let me talk briefly just about what Bruner and Bowman 14:40:51
10 actually did to challenge this count. Because I think the 14:40:57
11 supposition here is, well, they did nothing to challenge this 14:40:59
12 count, and that's absolutely not true. 14:41:02

13 So they challenged the legality of this felony charge in a 14:41:04
14 motion in limine, arguing that Jones did not have legal care 14:41:08
15 and custody of Rachel. That's in the record on appeal at 63. 14:41:10

16 He told the jury in opening statements: You will hear that 14:41:15
17 there is nothing obvious about the baby that day, about Rachel 14:41:17
18 that day, something that would have caused Barry to just think 14:41:20
19 he had to take her to the hospital. 14:41:23

20 They attempted to establish at trial that Jones did not 14:41:25
21 make medical decisions for Rachel. 14:41:27

22 After the state's presentation, they moved, under Rule 20, 14:41:30
23 to dismiss that count on the basis that he had no legal duty or 14:41:33
24 care. 14:41:36

25 He argued to the jury in closing arguments that Jones did 14:41:37

1 not have a legal duty to Rachel. 14:41:40

2 The jurors were specifically instructed in this case to 14:41:42

3 consider each offense separately, quote, "uninfluenced by your 14:41:46

4 decision as to the other charges." 14:41:52

5 They were also instructed to consider all lesser-included 14:41:54

6 offenses, as well as all mental states. 14:41:58

7 THE COURT: At the trial, did the state ever argue the 14:42:00

8 same question I posed to petitioners? 14:42:04

9 MR. BRACCIO: No. 14:42:07

10 THE COURT: Did the state ever argue -- well, you 14:42:07

11 don't know what my question is. 14:42:09

12 MR. BRACCIO: I'm sorry, Your Honor. I thought you 14:42:11

13 were going to -- 14:42:12

14 THE COURT: You know. 14:42:12

15 MR. BRACCIO: Go ahead. I apologize. 14:42:14

16 THE COURT: Did the state ever pose or frame the issue 14:42:16

17 to the jury that, even if he did not commit the offenses in the 14:42:21

18 other charges, standing alone, they could find him guilty of 14:42:26

19 count four? Or was the state's theory at trial that the 14:42:32

20 conduct contained in all these counts were essentially 14:42:37

21 inextricably intertwined? 14:42:41

22 MR. BRACCIO: The first. 14:42:45

23 The state argued sequentially that Jones was guilty of all 14:42:46

24 of the charges, but there was nothing, there was no theory by 14:42:48

25 the prosecutor, that they were somehow so essentially 14:42:52

1 intertwined that they are interrelated and relied upon each 14:42:55
2 other. That's absolutely not true. The prosecutor argued each 14:42:59
3 individual count consistent with the jury instructions. 14:43:03

4 THE COURT: Did the prosecutor ever argue -- my 14:43:05
5 question, I think, may be just a little bit different. 14:43:08

6 MR. BRACCIO: Okay. 14:43:08

7 THE COURT: Did the prosecutor ever argue that even if 14:43:11
8 they don't find him guilty of counts one through three and 14:43:13
9 five, they could find him guilty of count four because? 14:43:17

10 MR. BRACCIO: Not that explicitly, but I think it's 14:43:21
11 there. So let me show -- 14:43:24

12 THE COURT: Show me where it is. 14:43:26

13 MR. BRACCIO: Let me show you what the prosecutor -- 14:43:27
14 so this is the record on appeal, this is transcript April 13th, 14:43:29
15 1995. This is the closing argument of the prosecutor. 14:43:32

16 So, as she is discussing these counts, this is the 14:43:40
17 part in her closing argument where she addresses the failure to 14:43:43
18 render aid. This is at Page 88. She says: 14:43:47

19 Count four. That night -- well, actually start 14:43:51
20 earlier. During that afternoon on Sunday, Rachel was bleeding 14:43:53
21 from her head. Who's the only adult with her? The defendant. 14:43:57
22 Does he take her anywhere to get that wound treated? No, he 14:44:01
23 doesn't. He was the only person who was -- who had -- who had 14:44:04
24 care of Rachel during those hours; and he didn't take care of 14:44:13
25 her, didn't get her the medical attention she needed, and he 14:44:16

1 compounded that omission by sitting silently by during the 14:44:20
2 night as Rachel suffered. 14:44:24

3 The defense counsel told you in opening you are going 14:44:26
4 to hear, ladies and gentlemen, there wasn't anything obvious 14:44:30
5 about Rachel that night that would have given anybody a clue 14:44:33
6 that anything was wrong with her. 14:44:36

7 Rebecca saw the bruises to her face and the bruises to her 14:44:37
8 fingers and her hands. Rebecca saw that baby throwing up. 14:44:41
9 Where was she throwing up? Do you remember Bruce Clark found a 14:44:44
10 pot? Becky told you she had been throwing up in that pot. 14:44:48
11 Well, the pot was found in the bedroom, the defendant's 14:44:53
12 bedroom, the bedroom he shared with Angela. 14:44:55

13 What are the symptoms of peritonitis? What are the 14:44:58
14 symptoms that something was seriously wrong with this baby? 14:45:03
15 Setting aside the fact that she hadn't stopped bleeding hours 14:45:05
16 after her injury was incurred, she is throwing up. Dr. Howard 14:45:08
17 and Dr. Seifert said she would have become dehydrated and want 14:45:12
18 to drink, but would continue to throw up, run a fever. She 14:45:17
19 would be in pain. She wouldn't even want to be able to lift 14:45:20
20 herself up or move around, the pain would be so great. 14:45:32

21 That's just from the internal injuries. 14:45:36

22 Imagine how she was feeling having an untreated laceration 14:45:39
23 bleeding from her head? Imagine how she was feeling bleeding 14:45:42
24 from the inside of ears? Imagine how she was feeling with 14:45:45
25 blood seeping in under her scalp as a result of blows she 14:45:48

1 received to the side and front of her face. Imagine how she 14:45:51
2 felt bleeding from the back of her neck, from the direct blow 14:45:53
3 to the back of her neck? Imagine how she felt with her little 14:45:56
4 vagina bleeding into her little underpants? 14:46:01

5 She was only four years old. 14:46:04

6 She even told Brandie her stomach hurt, depending on how 14:46:06
7 much to believe, how much Brandie had to say. 14:46:09

8 Nothing obvious about Rachel? Nothing that would give a 14:46:11
9 clue to the two adults who were supposed to be in charge of 14:46:16
10 her, who had care of her, that she needed medical attention? 14:46:19
11 Oh, there was lots obvious. 14:46:22

12 Angela Gray will have to deal with her responsibility for 14:46:23
13 her ignoring those obvious signs in another courtroom, in 14:46:26
14 another forum. The defendant has to deal with his now. 14:46:30

15 He was the only person in that household who had a car. He 14:46:33
16 was the only person in that household who had a means of 14:46:37
17 transportation. He had the money. He bought the groceries. 14:46:40
18 He built the children's bed. He had care of her all that day. 14:46:44

19 If you find that he shared responsibility for making sure 14:46:47
20 that Rachel got the medical treatment that she needed, then he 14:46:52
21 is guilty of intentionally and knowingly failing to provide 14:46:55
22 that care. And if you find that she died also as a result of 14:46:57
23 that, it was under circumstances likely to produce death or 14:47:01
24 serious physical injury. 14:47:04

25 And we know from Dr. Seifert's testimony surgical 14:47:06

1 intervention could have saved her, but he and the woman with 14:47:09
2 whom he was living at the time chose not to provide her with 14:47:12
3 that simple surgical intervention. Instead, they wait until 14:47:15
4 she had been dead two or three hours before they decided to try 14:47:18
5 CPR and take her to the hospital. 14:47:22

6 Rachel Gray did not have to die. Rachel Gray could have 14:47:24
7 celebrated her fifth birthday, but, because of all of this, she 14:47:28
8 will not. Because of Barry Lee Jones, she will not. And that, 14:47:32
9 of course, is the issue. 14:47:35

10 THE COURT: So maybe on that same section of the 14:47:37
11 transcript, if you could turn back to Page 86 with me, please. 14:47:41

12 MR. BRACCIO: Sure. To which page? 14:47:44

13 THE COURT: Eighty-six. 14:47:47

14 MR. BRACCIO: It starts at 88. 14:47:48

15 THE COURT: No, I know, but I'm looking at 86. Do you 14:47:51
16 have 86? 14:47:54

17 MR. BRACCIO: I don't. 14:47:54

18 THE COURT: Okay. I do. 14:47:55

19 It says: Even more importantly -- this is the prosecutor's 14:47:55
20 argument -- what's the defense in this case? Not that Rachel 14:47:57
21 was not a victim of these crimes, but that "we got the wrong 14:48:01
22 guy." 14:48:05

23 So wasn't it ineffective of trial counsel, defense counsel, 14:48:05
24 not to look at the cause of the injuries? Because my 14:48:14
25 recollection of the evidentiary hearing were there were other 14:48:18

1 evidence proffered of how these injuries could have occurred. 14:48:23

2 Other than the state's theory, which is Mr. Jones did it. 14:48:30

3 Right? 14:48:36

4 MR. BRACCIO: Sure. 14:48:36

5 THE COURT: So what follow-up was done? What 14:48:37

6 follow-up was done by the state? 14:48:41

7 Because this statement says that the state's theory is 14:48:43

8 the state -- the prosecutor is summarizing what they believed 14:48:48

9 to be the defense at trial, which is you got the wrong guy. 14:48:52

10 MR. BRACCIO: Mmm-hmm. 14:48:56

11 THE COURT: Not that these injuries could have been 14:48:56

12 not crimes. 14:48:58

13 MR. BRACCIO: I'm not sure I follow. 14:49:03

14 THE COURT: So I am saying what -- wasn't it 14:49:04

15 ineffective assistance not to follow up on some of these other 14:49:09

16 causes of these injuries? 14:49:14

17 MR. BRACCIO: No, I believe the counsel followed up on 14:49:16

18 all of these injuries. 14:49:18

19 THE COURT: Okay. 14:49:20

20 MR. BRACCIO: And I can take you through all of that. 14:49:20

21 So this is on the failure to seek aid. I think to 14:49:22

22 answer Your Honor's first question for petitioner and 14:49:26

23 respondent: Did the prosecutor argue to the jury that these 14:49:29

24 were so intertwined? I think, very clearly, the answer to that 14:49:33

25 is in this transcript, the prosecutor did not argue that. The 14:49:34

1 prosecutor stated very close to exactly what the jury 14:49:36
2 instructions were, which is to consider each count separately 14:49:39
3 and base the evidence in your conviction off of that. 14:49:43

4 And of course they've conceded essentially in this 14:49:51
5 hearing that their own experts agree that it was fatal neglect 14:49:53
6 for Jones not to take Rachel to the hospital. 14:49:57

7 I can show his own experts agreed. 14:50:03

8 This is Dr. Ophoven's 2002 report: In the hours before 14:50:09
9 Rachel and Barry went to bed, it would have been evident to 14:50:12
10 anyone with Rachel that she was in need of immediate medical 14:50:14
11 attention. It is my opinion that the decision to withhold 14:50:17
12 medical care is consistent with fatal neglect. 14:50:21

13 And I would mention again, too, there's been a lot of 14:50:23
14 argument here about what Barry Jones knew, and whether he knew 14:50:28
15 to take her to the hospital and how serious his (sic) injuries 14:50:34
16 were. 14:50:36

17 THE COURT: Right. 14:50:36

18 MR. BRACCIO: The jury already found that. The jury 14:50:37
19 found that he intentionally failed to take her. 14:50:39

20 The Arizona Supreme Court affirmed that decision, 14:50:41
21 finding it was both sufficient evidence and a predicate felony 14:50:44
22 for felony murder, and of course those are entitled to 14:50:47
23 deference by this Court. So Jones can't simply reargue the 14:50:50
24 trial evidence in his favor for this count. 14:50:54

25 Of course, Your Honor, I cited that the lawyer's 14:50:57

1 arguments or theories are not evidence. 14:51:04

2 The jury was properly instructed to consider each offense 14:51:06
3 separately. 14:51:10

4 The jury's special verdicts found each offense separately. 14:51:16

5 This is for the child abuse count, count four. By failing 14:51:21
6 to take the victim to the hospital, as alleged in count four, 14:51:24
7 the jury also specifically found that it was an objective 14:51:29
8 circumstance likely to produce death or serious physical 14:51:31
9 injury, and that he committed it intentionally or knowingly. 14:51:34

10 The prosecutor did not intertwine these crimes. 14:51:42

11 And Jones is also wrong on Arizona law. 14:51:46

12 He also made an argument about comparing it to the Angela 14:51:51
13 Gray trial and verdict. And, of course, this Court cannot 14:51:55
14 compare, legally, jury verdicts. I cited this court a number 14:51:58
15 of cases: -- *Powell, Dunn, Hart* -- for that proposition. 14:52:02

16 THE COURT: But you also pointed out, you know, what 14:52:06
17 he's characterized as significant differences in the testimony 14:52:10
18 that was given in both trials. So you're telling me that -- 14:52:14
19 how does that factor? 14:52:17

20 MR. BRACCIO: Let me bring that up, Your Honor. 14:52:26

21 I believe that's a mischaracterization of this record. I 14:52:28
22 think Dr. Howard has consistently stated his opinion time and 14:52:30
23 time again. And let me show you, let me turn to that. 14:52:34

24 THE COURT: Sure. 14:52:34

25 MR. BRACCIO: Trial counsel investigated every aspect 14:52:36

1 of this case that they have been accused of neglecting. 14:52:39

2 I mentioned a couple other additional things, like their 14:52:42
3 pretrial motion practice. This is directly relevant. If the 14:52:44
4 Court looks to the *Strickland* decision, it will see that that's 14:52:47
5 another factor. 14:52:50

6 They challenged every legal aspect of this case that they 14:52:51
7 could. Fourth Amendment, searches of the van, the trailer. 14:52:54
8 Fifth Amendment, his statements. Severance, *Bruton* and 14:52:56
9 antagonistic defenses. 14:53:00

10 What I found startling was they were actually successful in 14:53:02
11 precluding Jones' violence towards his own children, as well as 14:53:06
12 Rachel's statements that he was the person who had inflicted 14:53:10
13 the injuries on her with the metal shoe bar. 14:53:14

14 The trial court even noted on the eve of trial: "One of 14:53:17
15 Bruner's strategies is to paper us to death. " 14:53:18

16 I think the record clearly indicates that there was funding 14:53:21
17 challenges that Bruner and Bowman faced. The Court wouldn't 14:53:24
18 even officially appoint second counsel, as well as funding for 14:53:30
19 experts. 14:53:33

20 So let's talk about the medical investigation. 14:53:34

21 Both Bruner and Bowman had previously represented capital 14:53:36
22 defendants, and Bruner specifically had handled cases involving 14:53:40
23 medically-complex injuries. 14:53:44

24 THE COURT: Wasn't he qualified as an expert? 14:53:46

25 MR. BRACCIO: Yes. 14:53:48

1 THE COURT: Not an expert. But he had a -- 14:53:48

2 MR. BRACCIO: A specialist. 14:53:48

3 THE COURT: A specialist. 14:53:48

4 MR. BRACCIO: He was a criminal law specialist. 14:53:49

5 In preparation for the case, they read all the police 14:53:51

6 reports, the autopsy report, the medical hospital records, and 14:53:55

7 specifically an article about duodenal injuries. 14:53:58

8 The medical investigation, they immediately requested 14:54:02

9 funding for an independent medical examiner to review the 14:54:06

10 autopsy report and Dr. Howard's medical conclusions. 14:54:09

11 Bruner and Bowman contacted Dr. Phillip Keen. He agreed to 14:54:12

12 consult with them. 14:54:17

13 After speaking with Dr. Keen, Bruner and Bowman drafted the 14:54:18

14 letter to him identifying the areas they wanted him to focus 14:54:23

15 on. This letter in the record is the only evidence that speaks 14:54:25

16 to this, about where they were focused in terms of their 14:54:32

17 medical investigation. 14:54:35

18 Could you please tell me what kind of symptoms this child 14:54:37

19 would have experienced from a small bowel laceration? How long 14:54:40

20 after the injury occurred could this child die -- would this 14:54:44

21 child die? Can the injury be dated? Can the time of death be 14:54:48

22 determined? Could such an injury have been inflicted by 14:54:52

23 another small child? 14:54:55

24 These are all attempts to corroborate what they were 14:54:57

25 hearing from Barry Jones, and specifically the timing of these 14:54:59

1 injuries. And that's a natural question, given these medical 14:55:03
2 injuries, because they're looking to find out who did this to 14:55:06
3 her and when did they do it. 14:55:08

4 So can the injury be dated? If this injury occurs three 14:55:10
5 days earlier, I need to focus my investigation on three days. 14:55:13

6 In your opinion, are the multiple contusions and 14:55:15
7 lacerations consistent with child abuse, or could they be 14:55:21
8 within the normal range of injuries sustained by a rough or 14:55:25
9 clumsy child? 14:55:28

10 Again, she is looking for all the ways in which the medical 14:55:29
11 evidence can help corroborate aspects of their defense. 14:55:31

12 And number seven: Can the injury to the genitalia be 14:55:34
13 dated? Is there explanation aside from sexual abuse? And is 14:55:37
14 the hemorrhage behind the tympanic membranes consistent with a 14:55:41
15 fall that resulted in a bumped head? 14:55:45

16 This letter proves beyond any doubt in this record that 14:55:47
17 Bruner and Bowman were focused on the timing and nature of 14:55:50
18 these injuries. 14:55:53

19 THE COURT: Yeah, but what about the follow-through? 14:55:54

20 MR. BRACCIO: Okay. So they spoke with Dr. Keen the 14:55:56
21 following month, on August 18th, 1994. Bruner, Bowman, and 14:55:59
22 Dr. Keen have no independent recollection of this conversation, 14:56:03
23 so this Court must presume by law that they acted competently 14:56:05
24 and they performed competently. 14:56:10

25 THE COURT: Then how do you address the slide issue? 14:56:12

1 MR. BRACCIO: What slide issue? That he didn't look 14:56:14
2 at any of the slides? 14:56:18

3 THE COURT: Correct. 14:56:19

4 MR. BRACCIO: First of all, I don't know that we know 14:56:20
5 what he looked at, so we don't have specific evidence that says 14:56:22
6 the slides were sent to him and he reviewed them. 14:56:25

7 THE COURT: Well, I thought the -- correct me if I'm 14:56:29
8 wrong, but I thought the evidence at the evidentiary hearing 14:56:31
9 was that if the slides had been sent there would be a record of 14:56:34
10 the slides being sent, if the slides had been received by 14:56:38
11 Dr. Keen there would be a record that they were received, and 14:56:43
12 that there is an absence of either. So how can I presume under 14:56:46
13 those circumstances that he reviewed the slides? 14:56:52

14 MR. BRACCIO: Maybe he did, maybe he didn't. I think 14:56:58
15 that was -- 14:57:00

16 THE COURT: Well, I know you would like to say 14:57:01
17 maybe -- 14:57:05

18 MR. BRACCIO: Sure. 14:57:05

19 THE COURT: But if the testimony at the hearing was if 14:57:06
20 we send slides there's a record -- 14:57:09

21 MR. BRACCIO: Sure. 14:57:11

22 THE COURT: -- and if the testimony from Dr. Keen is 14:57:11
23 if we received slides there's a record, and there is no record 14:57:15
24 on either end -- 14:57:18

25 MR. BRACCIO: Sure. 14:57:19

1 THE COURT: -- how can I presume that he reviewed the 14:57:19
2 slides? 14:57:23

3 MR. BRACCIO: Okay. And you don't have to presume 14:57:24
4 that he reviewed the slides. 14:57:26

5 So in the letter from Bruner and Bowman to Dr. Keen -- 14:57:27

6 THE COURT: The letter we were just looking at. 14:57:31

7 MR. BRACCIO: Yes. -- she said what we will do is 14:57:33
8 send you the autopsy report and speak with you about these 14:57:35
9 injuries, and if you need any additional follow-up or request 14:57:39
10 anything, we'd be happy to provide those to you. Like the 14:57:42
11 tissue slides -- 14:57:45

12 THE COURT: But didn't he testify at the hearing that 14:57:46
13 he would not make a diagnosis absent looking at the slides? Or 14:57:48
14 am I misremembering his testimony? Didn't he say that he would 14:57:52
15 have to see the slides in order to form an opinion? 14:57:55

16 MR. BRACCIO: I don't recall that testimony. But I 14:57:59
17 would note for the Court still he hasn't reviewed the slides. 14:58:01
18 He still hasn't reviewed the slides. 14:58:04

19 THE COURT: So your argument is it's fair for me to 14:58:06
20 assume that he never reviewed the slides. 14:58:10

21 MR. BRACCIO: I think that's a fair assumption, that 14:58:12
22 he probably never reviewed the slides. 14:58:14

23 I think what Dr. Keen did was he knew the nature of 14:58:15
24 this injury, the duodenal injury and the vaginal injuries, he 14:58:18
25 had the autopsy report, so he understood what Dr. Howard was 14:58:22

1 saying, and he can talk to Bruner and Bowman about the timing 14:58:26
2 of this type of injury. 14:58:29

3 All of the pathologists and all of the doctors in this case 14:58:31
4 specifically say: We can't give you a precise determination of 14:58:33
5 the time in which this injury is inflicted, but we generally 14:58:36
6 know, in the pathology, that this injury can be from hours to 14:58:40
7 days. 14:58:43

8 THE COURT: So I am misremembering his testimony at 14:58:43
9 the evidentiary hearing where I thought I recall him saying he 14:58:46
10 would need to have the slides and review the slides before he 14:58:48
11 could render an opinion? 14:58:51

12 MR. BRACCIO: Your Honor, he still hasn't reviewed the 14:58:53
13 slides in this case. I am not sure if he's rendered an opinion 14:58:55
14 in this case. I have his testimony here, too, that we can go 14:58:59
15 through, and you may have remembered that correctly. 14:59:02

16 I think Dr. Keen did tell Bruner and Bowman about the 14:59:04
17 nature of this, and that he couldn't offer any specific 14:59:08
18 rebuttal to what Dr. Howard was saying, that Dr. Howard's 14:59:11
19 opinions were consistent with this injury being inflicted on 14:59:13
20 the Sunday before. 14:59:17

21 THE COURT: Well, I understand what you're saying. 14:59:20

22 MR. BRACCIO: Again, this Court must presume by law 14:59:23
23 that they performed competently. Obviously, you have to 14:59:26
24 presume by law that they spoke with Dr. Keen about the case, 14:59:28
25 the autopsy and the medical records, and the timing and nature 14:59:33

1 of the injuries. 14:59:35

2 THE COURT: So if they didn't send the slides, that 14:59:36
3 would be competent? 14:59:38

4 MR. BRACCIO: Yes. They sought out an independent 14:59:41
5 medical pathologist to provide them with medical evidence about 14:59:43
6 the nature of these injuries, and their letter speaks 14:59:47
7 specifically to that so that they could understand. 14:59:51

8 If they had met with Keen and Keen said, "oh, no, the 14:59:53
9 nature of this injury is seven days to thirty days," they would 14:59:57
10 have called Dr. Keen. So they clearly understood from Dr. Keen 15:00:01
11 the nature of the injury. 15:00:10

12 THE COURT: If keen told them at the time that he 15:00:13
13 needed the slides in order to form an opinion and they didn't 15:00:17
14 send him the slides, your argument is that is still competent? 15:00:21
15 They were still -- they provided competent representation in 15:00:27
16 that case? Is that your argument? 15:00:30

17 MR. BRACCIO: I think that's a closer call. If 15:00:33
18 they -- 15:00:35

19 THE COURT: Well, is it not a yes or a no? 15:00:35

20 MR. BRACCIO: Well, I think seeking out an independent 15:00:38
21 medical pathologist under *Strickland* clearly satisfies the 15:00:40
22 standard. 15:00:40

23 But I think I can also refer to Leslie Bowman's -- 15:00:44

24 THE COURT: Well, I can seek somebody out by calling 15:00:44
25 them on the phone; but if they tell me they need certain things 15:00:46

1 in order to render an opinion, am I not obligated to provide 15:00:48
2 them that information? 15:00:52

3 MR. BRACCIO: You are. 15:00:53

4 THE COURT: And if I didn't provide that information, 15:00:54
5 what kind of job am I doing? 15:00:56

6 MR. BRACCIO: Sure. And so, in that regard, I would 15:00:58
7 also refer the Court to Leslie Bowman's testimony at the 15:01:01
8 evidentiary hearing, in which she said: If Dr. Keen would have 15:01:04
9 requested more evidence, including the tissue slides, I would 15:01:07
10 have sent it to him. Bruner also testified the same way. And 15:01:10
11 I even asked Ms. Bowman on the stand: Have you ever in your 15:01:14
12 career had evidence that would have been helpful for a client 15:01:17
13 and you just refused to put it on or you dropped the ball? And 15:01:20
14 she said: Never in my career. 15:01:24

15 So we have specific testimony from the lawyers in this 15:01:26
16 case that said: If Dr. Keen would have requested that 15:01:28
17 additional information, I would have provided it to him. 15:01:31

18 And as well, Dr. Keen, if he would have rebutted any 15:01:36
19 claim of the medical claim in Jones' favor, Bruner and Bowman 15:01:41
20 testified they would have called him as a witness. 15:01:45

21 Thus, I think within three months -- and here's my 15:01:46
22 understanding of the record and why this is well beyond the 15:01:49
23 minimally competent standards of *Strickland*. 15:01:52

24 Within three months of Rachel's death and Jones' arrest, 15:01:55
25 they had reviewed the autopsy report and medical records, 15:01:58

1 reviewed the police reports, spoke to Jones numerous times, 15:02:01
2 obtained an investigator and sent him out to the Desert Vista 15:02:05
3 Trailer Park, sought out an independent medical pathologist and 15:02:09
4 consulted with him about the nature and timing of those 15:02:13
5 injuries. 15:02:16

6 If Dr. Keen offered no rebuttal, Bruner testified in this 15:02:16
7 case that he wouldn't keep shopping for an expert. And I think 15:02:21
8 that's where we're drawing the line in this hearing. I think 15:02:24
9 Jones' current counsel would suggest that in order to be 15:02:27
10 constitutionally efficient under the law, they need to call 15:02:31
11 experts, and that's simply not the law. 15:02:34

12 THE COURT: I understand your argument on this point. 15:02:38
13 Why don't you turn your attention to the second question, the 15:02:40
14 second question that I asked, which is the law enforcement 15:02:43
15 investigation. 15:02:47

16 MR. BRACCIO: Okay. 15:02:47

17 The law enforcement investigation, we have contended 15:02:55
18 all along, is simply not relevant in this case. There is no 15:02:58
19 claim before the Court that law enforcement -- law enforcement 15:03:01
20 was deficient. 15:03:04

21 As it's contained in an ineffective assistance of counsel 15:03:08
22 claim, again, what did the lawyers do? Law enforcement has 15:03:13
23 nothing to do with this case. What did the lawyers do or what 15:03:16
24 did they fail to do, and what have they presented now to show 15:03:19
25 that law enforcement was deficient, and what's the actual 15:03:22

1 prejudice? What did law enforcement miss that they can 15:03:25
2 affirmatively show this Court now demonstrates reversible 15:03:28
3 prejudice? 15:03:32

4 And there is nothing in this case -- 15:03:33

5 THE COURT: We don't know if they didn't follow up on 15:03:34
6 important aspects of the investigation. For instance, 15:03:38
7 Investigator Pesquiera, I thought her testimony was she 15:03:42
8 acknowledged she never followed up with interviewing Zolie. 15:03:46

9 MR. BRACCIO: Sure. 15:03:49

10 THE COURT: Am I remembering correctly? 15:03:51

11 MR. BRACCIO: You are, Your Honor. Let me talk 15:03:53
12 about -- 15:03:58

13 THE COURT: And if I recall correctly, wasn't that the 15:03:59
14 reason Angela took the children out of the living situation 15:04:02
15 with Zolie because she didn't feel safe there? And then she 15:04:06
16 moved in with Mr. Jones? 15:04:13

17 MR. BRACCIO: Yeah, let me be very careful about what 15:04:15
18 this record says. Angela -- 15:04:17

19 THE COURT: I just want to make sure I understand the 15:04:18
20 record correctly. 15:04:19

21 MR. BRACCIO: Yeah. You know, let me start off by 15:04:20
22 saying this is Jones' burden. He has access to Angela. He's 15:04:21
23 been in contact with Angela. He could call Angela in this 15:04:26
24 proceeding. He can investigate and find Zolie. He can 15:04:29
25 investigate and find other suspects. 15:04:32

1 THE COURT: In fairness, you're saying that, 23 years 15:04:34
2 after the fact, it was his burden to go find Zolie, when 15:04:38
3 Investigator Pesquiera said at the time she never followed 15:04:43
4 through and tried to find or interview Zolie? Is that your 15:04:47
5 argument? 15:04:51

6 MR. BRACCIO: Yes. That he has to affirmatively find 15:04:52
7 evidence to affirmatively show prejudice, and that Zolie was a 15:04:55
8 potential other suspect. 15:04:58

9 Let me talk to the Court about what the evidence about 15:05:01
10 Zolie was that directed the law enforcement investigation and 15:05:04
11 what the lawyers knew about who Zolie was. Okay? 15:05:07

12 Angela told detectives that Zolie hit her when he was 15:05:10
13 drunk, but she repeatedly stated that he never abused any of 15:05:14
14 her children. And I have all of those interviews here. 15:05:18

15 This is Exhibit 1, at Page 512. 15:05:22

16 Question: Was he abusive towards the kids? 15:05:25

17 No. 15:05:28

18 Not at all? 15:05:29

19 No, not at all. 15:05:30

20 This is Zolie. 15:05:32

21 Let's go to the next interview. 15:05:36

22 He has never, ever hit the kids, or me. 15:05:38

23 No. Oh, no, no, no. Nobody has ever hurt my kids. 15:05:42

24 He used to slap me. 15:05:48

25 Okay. So he never -- 15:05:49

1 But never the kids, no. 15:05:52

2 Let's go to her other interview. Exhibit 66 at 5183. 15:05:54

3 I did have some problems with the way he treated me. 15:05:59

4 And this is to Your Honor's question, I think, about why 15:06:02

5 she moved out of his residence. 15:06:04

6 What would he do to you? 15:06:07

7 So he would -- he'd just get drunk and slap me 15:06:09

8 around. 15:06:12

9 What -- would he do that to the children? 15:06:12

10 No. No. 15:06:14

11 When was the last contact he had with the children? 15:06:15

12 Um. 15:06:18

13 And with Rachel? 15:06:18

14 He -- for -- for Rachel's birthday. He came and saw 15:06:20

15 her on her birthday. 15:06:23

16 That's the last contact that Zolie had with Rachel or any 15:06:24

17 of the children, was April 7th, when he came by for Rachel's 15:06:28

18 birthday. 15:06:32

19 Now this is Rebecca. Rebecca told the defense attorneys 15:06:33

20 that Zolie never hit her or any of the children, so she's 15:06:42

21 corroborating Angela's statements. 15:06:46

22 All right. Did Zolie ever hit you? 15:06:48

23 No. 15:06:50

24 Did Zolie ever hit any -- ever hit Rachel? 15:06:51

25 No. 15:06:55

1 What about Johnny? 15:06:56

2 No. 15:06:57

3 What about Angela, your mom? 15:06:58

4 Yes. 15:07:01

5 Amanda Gray also told detectives that she never saw any 15:07:05

6 bruising on the children before they moved in with Barry Jones. 15:07:08

7 And as I mentioned, Zolie stopped by shortly after Angela 15:07:13

8 and the children moved in with Jones. Zolie and Jones got into 15:07:16

9 a fight, Jones took him to the ground, and Zolie never came 15:07:19

10 around again. Zolie had no history of abuse to the children. 15:07:23

11 So this is what the lawyers knew: They knew from the 15:07:30

12 statements to Pesquiera and to the lawyers that there was no 15:07:33

13 history of abuse by Zolie. Zolie never hit any of the 15:07:37

14 children, he only slapped Angela. 15:07:41

15 THE COURT: But I seem to recall medical testimony at 15:07:45

16 the evidentiary hearing that the vaginal injuries could have 15:07:50

17 been much older -- 15:07:55

18 MR. BRACCIO: Yeah. 15:07:59

19 THE COURT: -- than the day before. That there was -- 15:08:00

20 there were certainly signs of fresh bleeding, which could have 15:08:04

21 been caused by yet another assault or could have been caused by 15:08:08

22 scratching, but that the vaginal injuries could have 15:08:13

23 occurred -- and I don't want to misstate the record -- but it 15:08:19

24 could have occurred up to weeks before. 15:08:22

25 MR. BRACCIO: Yeah. 15:08:24

1 THE COURT: Am I remembering correctly? 15:08:24

2 MR. BRACCIO: Yes, you are, Your Honor. 15:08:26

3 Let me walk you through that testimony. 15:08:28

4 THE COURT: Okay. 15:08:29

5 MR. BRACCIO: Okay. And maybe if I can address both 15:08:31

6 the testimony on the abdominal injury, as well as the vaginal 15:08:33

7 injury. 15:08:36

8 THE COURT: Yeah, please. 15:08:37

9 MR. BRACCIO: This is very important. 15:08:37

10 So, with these internal injuries, Jones called Drs. 15:08:41

11 Ophoven and McKay. 15:08:49

12 Dr. Ophoven, with the abdominal injury, repeatedly changed 15:08:50

13 her timeline. In her first report, she indicated that this 15:08:53

14 abdominal injury was 24 to 48 hours, and perhaps longer, prior 15:08:55

15 to her death. 15:08:58

16 Her postmortem weight is consistent with these abnormal 15:09:01

17 chemistries, and in my opinion represents an injury that had to 15:09:05

18 be present greater than 24 to 48 hours, and perhaps longer. 15:09:09

19 THE COURT: Maybe I'm misremembering, but didn't she 15:09:13

20 testify at the last evidentiary hearing that -- wasn't it a 15:09:16

21 different stain that was used to help refine her assessment? 15:09:18

22 MR. BRACCIO: Yeah. Very good memory on this. For 15:09:22

23 the vaginal injuries. 15:09:24

24 Now, I want to be very clear about what I think the 15:09:25

25 record says in this case, because I think this is sort of an 15:09:27

1 open question about what she reviewed. 15:09:31

2 My review, when you look at her -- let me go to the 15:09:33
3 vaginal injuries. This is everything that Ophoven has to say 15:09:37
4 about the vaginal injuries. 15:09:52

5 She dated the vaginal injuries shortly before death in her 15:09:54
6 first two reports. This is her 2002 report, Exhibit 103. Now 15:09:57
7 let me key in on this right here. 15:10:04

8 My review of the autopsy included 13 H&E stain tissue 15:10:07
9 slides, 13 trichrome stain tissue slides, 13 iron stain tissue 15:10:13
10 slides, autopsy report, toxicology and chemistry results. 15:10:18

11 My reading of Dr. Ophoven's report is that she reviewed 15:10:24
12 these tissue slides with this staining: the H&E, the trichrome, 15:10:27
13 and the iron. 15:10:32

14 Now, the atlas that they subsequently admitted in this 15:10:33
15 hearing -- and Dr. Ophoven doesn't make it clear on the stand 15:10:36
16 what new type of staining she reviewed. And I think from the 15:10:39
17 atlas that I subsequently reviewed prior to argument today, it 15:10:43
18 indicates a trichrome stain. 15:10:45

19 Those are the only stains possible to put onto a tissue 15:10:48
20 sample to determine the age. 15:10:51

21 So I can't conclude from the record before the Court that 15:10:53
22 she reviewed any new type of special staining that would have 15:10:57
23 given her any special insight into that, or why she didn't 15:11:00
24 review that prior to this 2002 report. 15:11:04

25 Again, from her 2002 report here, she says she reviewed 15:11:07

1 tissue slides. Section from vagina, labia minora, genital skin 15:11:11
2 shows acute hemorrhage less than six hours prior to death. So 15:11:17
3 Dr. Ophoven is putting the vaginal injury less than six hours 15:11:22
4 prior to death. 15:11:25

5 In addition, in her report, she subsequently concludes, to 15:11:31
6 a reasonable degree of medical certainty, the presence of 15:11:34
7 genital trauma without evidence of ejaculate leaves only the 15:11:38
8 conclusion that the child suffered acute injuries, most 15:11:41
9 probably penetrating, shortly before her death. 15:11:44

10 She said the exact same thing in her subsequent report, in 15:11:47
11 2009, that the child suffered acute injuries, most probably 15:11:55
12 penetrating, shortly before her death. She concluded this, to 15:12:00
13 a reasonable degree of medical certainty, after reviewing those 15:12:05
14 tissue slides. 15:12:09

15 Then Ophoven changed her opinion about the vaginal injury 15:12:10
16 in her February 2010 report. And I want to pull up that report 15:12:13
17 for the Court. 15:12:18

18 She says now, in 2010: The presence of genital trauma 15:12:20
19 without evidence of ejaculate leaves only the conclusion that 15:12:24
20 the child suffered acute injuries, most probably penetrating, 15:12:28
21 sometime -- and now she brackets the change in her report -- 15:12:31
22 days, or perhaps longer, before her death. 15:12:37

23 Now Ophoven is completely changing course and saying, oh, 15:12:41
24 this is not six hours before death, now it's going to be days. 15:12:44

25 She has evidence of trauma -- again, in the same report, 15:12:49

1 she says she has evidence of trauma in the genital region 15:12:56

2 consistent with penetrating sexual injury of indeterminate age. 15:13:00

3 This injury is a disruption or laceration of the tissue. 15:13:03

4 It cannot be determined how or when this injury occurred. 15:13:07

5 So now Dr. Ophoven, in 2010, is saying, "I have no idea 15:13:11

6 when this injury occurred, I simply can't determine the date." 15:13:16

7 I think this shift is so important, I put side by side for 15:13:19

8 the Court to see, from the 2002 and 2009 reports to the 2010 15:13:26

9 report: The presence of genital trauma without evidence of 15:13:30

10 ejaculate leaves only the conclusion that the child suffered 15:13:34

11 acute injuries, most probably penetrating, shortly before her 15:13:37

12 death; then, now, sometime days, or perhaps longer, before her 15:13:41

13 death. 15:13:46

14 Then at the hearing -- and this is getting right to Your 15:13:50

15 Honor's question -- Ophoven opined that the injury was weeks 15:13:53

16 old. 15:13:57

17 This is Dr. Ophoven's testimony from the hearing. The 15:13:57

18 question is: So just to make sure I understand, there is an 15:14:04

19 injury that's older, that's what you're saying. Yeah, the 15:14:06

20 wound that's unhealing (phonetic), that's weeks old. And then: 15:14:10

21 I can't say that she had -- that she had been sexually misused 15:14:13

22 multiple times, for instance. 15:14:18

23 And I am going to talk about that here momentarily. 15:14:19

24 THE COURT: And I'm happy to hear that, but I don't 15:14:24

25 want you to forget some the other questions, because you've got 15:14:27

1 less than 10 minutes left. 15:14:30

2 MR. BRACCIO: Okay. Getting back to this. I will 15:14:31
3 answer those questions. 15:14:31

4 There is no evidence in this record that Rachel ever 15:14:33
5 complained to anyone about this vaginal injury, which was 15:14:36
6 extraordinarily severe. This was half-an-inch in length and 15:14:38
7 three-sixteenths deep, and there is nothing in the record to 15:14:42
8 indicate that she ever said to anyone that she was in pain. 15:14:45

9 All the evidence in the record before this Court is that 15:14:49
10 Rachel was playing with the other children, bathing, riding her 15:14:51
11 bicycle the weekend before her death. 15:14:53

12 In fact, I think Jones' current counsel walked her into 15:14:59
13 some extraordinary positions. 15:15:02

14 They asked her: 15:15:05

15 Can you say anything about the age of the injury -- 15:15:06
16 this is the vaginal injury -- based upon these slides? 15:15:08

17 Answer: Weeks. 15:15:12

18 Weeks? 15:15:13

19 Yeah. This injury, this wound -- 15:15:14

20 Yes. 15:15:17

21 -- began weeks prior. 15:15:17

22 Is it possible that this wound would have predated 15:15:19
23 when Mr. Jones began living with Rachel Gray and her family, 15:15:21
24 which was just a few weeks before her death? 15:15:24

25 Yeah, it's possible. 15:15:27

1 They were living with Jones in the weeks before. The 15:15:29
2 undisputed evidence in this record is that they moved in with 15:15:33
3 Jones at the beginning of April and lived with him for at least 15:15:36
4 a month. So even saying that the injury's weeks old doesn't 15:15:39
5 predate them living with Jones. 15:15:43

6 And I think this also gets to Your Honor's Point. Ophoven 15:15:49
7 admitted that there could be a newer injury. This is her 15:15:52
8 testimony: 15:15:56

9 Do you recall at the time telling me that you 15:15:56
10 couldn't exclude a fresh trauma to the vagina? 15:16:00

11 No, I couldn't, but what I was answering to you -- 15:16:04
12 and I believe I already said that direct -- I couldn't say that 15:16:06
13 somebody didn't reinjure her or didn't cause newer bleeding or 15:16:08
14 trauma. 15:16:12

15 Ophoven is saying there is a newer injury, which does not 15:16:15
16 exclude Jones. 15:16:19

17 Dr. Keen also said the exact same thing about the vaginal 15:16:23
18 injury. He said that he saw evidence of a newer vaginal injury 15:16:27
19 superimposed on an older injury. 15:16:33

20 Staying on the topic though of the vaginal injury, I 15:16:36
21 think you had told us at your interview, do you recall saying 15:16:39
22 that you saw evidence of a new injury superimposed on that old 15:16:45
23 injury? 15:16:46

24 Yes, you see that. You see that when you actually 15:16:48
25 look at the gross photographs, you can draw that conclusion 15:16:52

1 from the character of the laceration that's occurring on the 15:16:56
2 floor of the vaginal vault there. But when you look at it 15:16:59
3 microscopically, you're seeing older things. 15:17:03

4 Question: So there is some sort of combination of an 15:17:07
5 older healing injury and a more fresh injury. 15:17:09

6 In the vaginal. 15:17:13

7 In the vaginal. 15:17:14

8 Yes. 15:17:15

9 Can you tell how fresh that new bleeding is, when 15:17:15
10 that would have occurred? 15:17:18

11 I can't really. 15:17:19

12 You just know that it's more recent than the older. 15:17:20

13 Yes. 15:17:23

14 So you agreed, I think, before that there is evidence 15:17:24
15 of repeat trauma to Rachel's vagina. 15:17:27

16 Repeat injury. I think I chose "injury" as opposed 15:17:30
17 to "trauma." 15:17:36

18 So Dr. Keen is also saying that there is a recent vaginal 15:17:37
19 injury to Rachel. Thus, Dr. Keen cannot rule out Jones as 15:17:41
20 having committed the sexual assault. 15:17:41

21 None of this evidence from Drs. Ophoven, McKay, or Keen 15:17:41
22 established prejudice because they cannot exclude him as the 15:17:41
23 assailant. To the contrary, they support Jones' convictions. 15:17:54

24 This is the eyewitness -- let me turn my attention to the 15:17:58
25 Court's other questions, I want to make sure I answer those. 15:18:01

1 THE COURT: You have six minutes left. 15:18:05

2 MR. BRACCIO: Okay. 15:18:06

3 Law enforcement's investigation. 15:18:07

4 I think there's been a lot of accusations that they didn't 15:18:08
5 follow through or anything. I think, to step back and actually 15:18:11
6 look at the investigation, the day after this death occurs, 15:18:14
7 Jones' ex-wife shows up and tells the police that Jones 15:18:18
8 violently assaulted his own children. And there's an order of 15:18:22
9 protection in the record before this Court supporting that, as 15:18:25
10 well as her statements in the interview. 15:18:28

11 In addition, Rachel's own statements were that Jones "did 15:18:31
12 this to me." He hit me with the metal shoe bar, or the metal 15:18:35
13 shoe horn. So we have the victim in this case pointing out who 15:18:41
14 her attacker is. 15:18:45

15 And when they go to interview Jones, they start to 15:18:47
16 understand that he's telling all kinds of lies about having 15:18:50
17 sought out medical care for Rachel. 15:18:53

18 And I think this also gets back to the fatal neglect as 15:18:55
19 well. 15:18:58

20 When it's, well, did Jones really know? Everybody who came 15:18:58
21 into contact with this child on Sunday saw her gravely hurt. 15:19:01
22 They all told Jones: You need to take her to the hospital. 15:19:05
23 And Jones said: Oh, I will. And then Jones takes her back and 15:19:09
24 puts her down for a nap. And then Jones lies to everybody and 15:19:13
25 says: Oh, I've had her medical evaluated already and they've 15:19:16

1 determined that she's fine. 15:19:19

2 So not only is Jones not seeking help for Rachel, he is 15:19:20
3 affirmatively dissuading multiple other people from actually 15:19:24
4 getting her the help that she needed. 15:19:27

5 So that's the law enforcement investigation. They focused 15:19:30
6 on Jones because the evidence overwhelmingly pointed to him 15:19:34
7 immediately. 15:19:38

8 I hope I've answered the Court's questions on the Arizona 15:19:38
9 non-unanimous jury law that any trial juror convicted Jones of 15:19:44
10 felony murder. The jury convicted him unanimously on each 15:19:48
11 predicate offense unanimously. They convicted him unanimously 15:19:52
12 on each one of those predicates. 15:19:56

13 Does count four satisfy the Enmund-Tison standard? That's 15:19:58
14 a very good question. 15:20:05

15 It's premature at this point, I think. We've thought about 15:20:06
16 this question, we've given it some consideration. I think it 15:20:09
17 does. We'd like more briefing certainly for the next phase, 15:20:12
18 for the sentencing, because I think this is a sentencing claim. 15:20:16

19 But certainly the Arizona Supreme Court's opinion -- and I 15:20:20
20 have the record cite for that. It's 937 P.2d 310 at 321. This 15:20:23
21 is head notes 20 and 21. 15:20:29

22 The Arizona Supreme Court found that he was a major 15:20:32
23 participant in all underlying felonies. And, of course, that's 15:20:35
24 in part a factual finding, which is entitled the deference 15:20:41
25 under the AEDPA, under 2254(e)(1). And that, under *Tison*, he 15:20:45

1 acted with reckless indifference and was a major participant in 15:20:56
2 the underlying felony, and the *Tison* finding alone can stand. 15:21:00

3 And finally, the Court: Why was it not deficient 15:21:04
4 performance of Jones' post-conviction counsel to request 15:21:08
5 funding for an investigator under the wrong rule? 15:21:11

6 Very glad the Court asked this question. I didn't get a 15:21:15
7 chance to squarely address this in my briefing. 15:21:18

8 Again, the standard is objective reasonableness. 15:21:21

9 We have to look at what was before the PCR counsel, before 15:21:24
10 Judge Hazel at that time. And on the record before him, he saw 15:21:27
11 that Bruner and Bowman had sought out an independent medical 15:21:30
12 pathologist, they had run down some of these injuries, these 15:21:33
13 injuries were all consistent. 15:21:37

14 He looked at the record and found that there was no need to 15:21:39
15 conduct additional investigation and to essentially go expert 15:21:42
16 shopping for that. 15:21:45

17 He testified he reviewed the whole file. 15:21:46

18 He testified specifically that it didn't matter what rule 15:21:48
19 he would have cited to the Court at that time. The practice in 15:21:52
20 Pima County in 1994 and '95, and a couple years afterwards, was 15:21:55
21 that they weren't given him funding. 15:21:59

22 So what he testified to in this hearing was that he 15:22:01
23 conducted his own investigation, and his claims were 15:22:03
24 successful, they were colorable, he achieved an evidentiary 15:22:07
25 hearing on several of them. 15:22:09

1 I also believe the record shows -- 15:22:11

2 THE COURT: I shouldn't be concerned that he couldn't 15:22:13
3 even cite the right authority for making the request? 15:22:17

4 MR. BRACCIO: No, I think that's -- I think that's 15:22:19
5 poor. He should have cited the right rule. But, again, his 15:22:21
6 testimony was it didn't matter what rule I cited to the 15:22:24
7 Court -- 15:22:27

8 THE COURT: But then didn't the Court -- didn't I come 15:22:28
9 back and say he didn't provide supporting information? 15:22:29

10 MR. BRACCIO: Yeah. 15:22:31

11 THE COURT: Isn't that a problem? 15:22:31

12 MR. BRACCIO: I think his testimony was that "I didn't 15:22:35
13 know what I needed to look for, absent an investigator. So 15:22:36
14 until I --" 15:22:39

15 THE COURT: So what is it, a Catch-22? 15:22:40

16 MR. BRACCIO: You know, he should -- you know, I can't 15:22:42
17 speak to -- I don't think it was a Catch-22. He said he 15:22:45
18 testified in this hearing that he did his own investigation. I 15:22:49
19 think he was the first to obtain an interview with Angela Gray. 15:22:52
20 So I think he did do a sufficient job. 15:22:57

21 And I think for purposes of this hearing and what the Court 15:23:01
22 needs to be concerned about, this is *Detrich*, from the Ninth 15:23:03
23 Circuit. This is -- we're just looking through what PCR 15:23:08
24 counsel did. I think he did an objectively reasonable job in 15:23:11
25 the PCR, but essentially their claim is that it's grounded in 15:23:15

1 all the claims that they've raised about trial counsel. 15:23:18

2 THE COURT: No, I understand that. 15:23:21

3 MR. BRACCIO: Yeah, so if they can prove that any of 15:23:21

4 the trial counsel claims had merit, then he probably was 15:23:23

5 ineffective for failed to having raise that claim. I think 15:23:27

6 it's probably that simple. 15:23:31

7 THE COURT: Forty-five seconds. 15:23:31

8 MR. BRACCIO: Okay. Let me see if I can do it. 15:23:32

9 I do want to talk about Dr. Howard's statements. 15:23:34

10 THE COURT: Start talking. 15:23:37

11 MR. BRACCIO: He were go. Here were Dr. Howard's 15:23:40

12 statements about the small bowel duodenal injury. 15:23:47

13 In his defense pretrial interview, he stated: This 15:23:49

14 inflammatory response is a matter of at least hours, perhaps a 15:23:52

15 day, hours to a day, progressively worsening. 15:23:56

16 Angela Gray's trial, I'm going to hit the highlights here. 15:23:59

17 One day prior to death. Twenty-four hours prior to death. 15:24:02

18 Findings are most consistent with that. Several hours, perhaps 15:24:06

19 12 hours, to get the degree of inflammation, that's 15:24:09

20 conceivable. He was asked: It would be from 12 hours on up 15:24:14

21 to, say, 24 to 36 hours? Answer: Yes. 15:24:16

22 Barry Jones' trial, what did he tell the Barry Jones jury? 15:24:20

23 Based upon the autopsy, the injury is typical of having 15:24:25

24 occurred about one day prior to death. This typical one-day 15:24:28

25 approximation included the head laceration, genital injuries, 15:24:32

1 and external bruises. He was asked: Is this consistent with 15:24:35
2 having occurred between 2:00 and 5:30 or 6:00 o'clock on May 15:24:39
3 1st? He testified: Any time on the 24 hours prior to that 15:24:45
4 would be consistent, so that time would be possible. 15:24:49

5 THE COURT: All right. We're going to have to end it 15:24:51
6 there. You're over time. 15:24:53

7 MR. BRACCIO: Thank you Your Honor. 15:24:55

8 THE COURT: Thank you, very much. 15:25:00

9 MR. SANDMAN: How much time do I have? 15:25:18

10 THE COURT: You have 11 minutes and 55 seconds. 15:25:20

11 MR. SANDMAN: Let me quickly go back to question one, 15:25:23
12 where we started this afternoon. 15:25:26

13 Your Honor, you'll read the closing argument, I am 15:25:27
14 sure, and you will find that the answer to your first question 15:25:31
15 for both counsel, the answer is no. 15:25:36

16 The prosecutor never ever said to the jury "even if 15:25:39
17 you find him not guilty of this, then he's guilty of that." 15:25:45
18 It's not in there. 15:25:50

19 Secondly, Mr. Braccio pointed out the verdict form 15:25:51
20 where the jury found him guilty. But they found him guilty of 15:25:56
21 intentional and knowing child abuse. 15:26:00

22 The whole question now, in light of the fact that we have 15:26:01
23 evidence that Mr. Jones is not the perpetrator, there are other 15:26:04
24 boxes on the verdict that says negligent or reckless. And my 15:26:08
25 contention is -- is to get from intentional to negligent, where 15:26:13

1 we want to be, or below negligent. But we want to get away 15:26:18
2 from intentional or knowing. To get there, the lawyers have to 15:26:22
3 prove he is not the killer, he is not the person who assaulted 15:26:26
4 the child; and to do that, they have to present medical 15:26:28
5 evidence. They've got to do all those things to show it wasn't 15:26:34
6 him. 15:26:38

7 THE COURT: Because it's the -- him being the 15:26:38
8 perpetrator puts him on notice of the severity of the 15:26:42
9 injuries -- 15:26:45

10 MR. SANDMAN: That gets you to intent. And if he's 15:26:45
11 just -- I mean, you saw pictures of Barry Jones, you saw his 15:26:48
12 trailer. If he just doesn't have it together and he's making 15:26:53
13 horrible decisions but is not the killer, then it's a lower 15:26:56
14 class of crime, it's not a murder case. 15:27:00

15 Mr. Braccio failed to read to you -- after reading a 15:27:03
16 number of pages from the closing argument, he failed to read 15:27:06
17 this from Page 104, Line 21 through Page 105, 2. Quote: Only 15:27:09
18 the defendant knew how badly she was hurt. Only the defendant 15:27:16
19 had the means of taking the baby to the hospital; but for 15:27:20
20 obvious reasons he could not, so he let her die. 15:27:24

21 And that's how they intertwined -- they got to the 15:27:27
22 mens rea they needed to get to. 15:27:33

23 In any event, I want to move on to another issue: 15:27:36
24 Dr. Keen. 15:27:41

25 Your Honor, your recollection was correct. When 15:27:44

1 Dr. Keen testified on October 31st, at Pages 71 and 73, he 15:27:49
2 reiterated that he would have needed to have reviewed the 15:27:55
3 slides to make any assessment, reliable assessment, of when the 15:27:58
4 injuries took place. 15:28:03

5 Dr. Keen is not the one to blame for not looking at 15:28:05
6 the slides. As I said, on a more -- 15:28:08

7 THE COURT: Isn't it conceivable though, if I 15:28:10
8 understand the respondent's argument, that he could have, in 15:28:12
9 that telephone conversation with counsel, discussed it and said 15:28:17
10 you're barking up the wrong tree? 15:28:22

11 MR. SANDMAN: The answer is no. 15:28:27

12 THE COURT: Which obviated the need to send the 15:28:28
13 slides? 15:28:32

14 MR. SANDMAN: Based on the evidence before this Court, 15:28:33
15 Dr. Keen testified that he would have told counsel that he 15:28:35
16 could not reliably -- and this is also in his declaration, 15:28:39
17 which is an exhibit: I would have told the lawyers I could not 15:28:44
18 reliably date the injuries without looking at the physical 15:28:47
19 evidence. 15:28:50

20 That's the testimony. 15:28:51

21 So I don't think, based on that uncontradicted record, that 15:28:52
22 we can presume that Dr. Keen said something else. 15:28:56

23 It's pretty standard. 15:28:59

24 As I noted earlier, Mr. Bruner told Judge Carruth he needed 15:29:04
25 someone to look at the slides. Dr. Howard was looking at 15:29:09

1 slides. Everybody -- they knew that that had to be done, and 15:29:12
2 they did not do it. 15:29:15

3 Dr. Ophoven. Her 2010 report, consistent with her 15:29:19
4 testimony, indicates that she did apply additional standing to 15:29:26
5 the anogential tissues, and it indicated substantial healing, 15:29:31
6 not consistent with a fresh penetrating injury. And then she 15:29:36
7 went on to say it didn't happen within the few days before her 15:29:41
8 death. 15:29:45

9 And on the final page of her three-page report, which is 15:29:45
10 Exhibit 106, I am looking at now, she said that the injury to 15:29:48
11 the vagina shows evidence of healing. 15:29:59

12 Then when she testified, you asked her some questions about 15:30:01
13 this specifically. And she said -- this was at Page -- I 15:30:06
14 believe Page 70. 15:30:12

15 Your Honor, when you questioned her, she said there was no 15:30:14
16 retraumatizing to the point where there was a retear. That 15:30:17
17 tear was old. It certainly didn't happen on May 1st, 1994. 15:30:22
18 And she couldn't exclude the fact that somebody might have 15:30:29
19 stuck something in her on that Sunday. But the point is that 15:30:33
20 tear is old; not as the jury at Mr. Jones' trial was told, that 15:30:40
21 it was all new. 15:30:46

22 She said that was a healing injury and that bleeding might 15:30:49
23 be due to DIC. Quoting her: There was no retraumatizing to 15:30:51
24 the point where it was return. The wound is unhealing and 15:30:55
25 weeks old. 15:31:00

1 That's a far cry from what Mr. Jones' jury was told, that 15:31:05
2 the vaginal tear occurred on Sunday. This injury, she said, 15:31:09
3 potentially goes back weeks. 15:31:13

4 And then Dr. Keen looked at the same slides and said that 15:31:14
5 it was not new, and that -- some of the hemorrhaging he related 15:31:18
6 to sanitary and hygiene. And he didn't relate anything to -- 15:31:23
7 he thought it could have been reinjured, he said, but not 15:31:29
8 retraumatized. 15:31:33

9 That's an old injury. And this case was not tried on the 15:31:36
10 theory that there was some old injury and she was touched by 15:31:41
11 Mr. Jones on Sunday. That wasn't the case. 15:31:46

12 There was a brief reference to Rachel's statements, which 15:31:49
13 of course were not presented to Jones' jury. And they're not 15:31:54
14 appropriate to be -- they were excluded from the trial, the 15:31:58
15 jury never heard them, and they're not appropriate to be 15:32:01
16 considered here. 15:32:04

17 As for Mr. Hazel, according to Mr. Cooper and Ms. Bowman 15:32:04
18 and Mr. Bruner, there was money to go around if you knew how to 15:32:14
19 ask for it, number one. Number two, if Mr. Hazel thought that 15:32:17
20 he wasn't going to get money and that was a fait accompli, an 15:32:22
21 effective lawyer makes a record. And Mr. Cooper testified 15:32:27
22 about this. 15:32:29

23 Even without Mr. Cooper's testimony, it's obvious that if I 15:32:31
24 think, Your Honor, you're not going to give me money, I'm going 15:32:36
25 to make a super record about why I need that money for my 15:32:41

1 indigent client. Otherwise I've kept it a secret, I'm not 15:32:45
2 going to try, and then we don't get any funding, I have nothing 15:32:50
3 to appeal. I mean, an effective lawyer always makes a record 15:32:53
4 with respect to his needs. 15:32:57

5 Mr. Hazel testified that he had plenty of information in 15:33:01
6 front of him that would have warranted the request for a 15:33:04
7 medical expert. He never asked for that. He asked for an 15:33:07
8 investigator. 15:33:11

9 So I think the record is clear that Mr. Hazel was anything 15:33:12
10 but effective (sic). Ineffective. Excuse me. 15:33:18

11 I have a couple of extra seconds, so let me go back to 15:33:33
12 question one again on count four. 15:33:38

13 Mr. Braccio argued, and they argued in their briefs, that 15:33:39
14 somehow you're bound by the jury verdict that they found intent 15:33:42
15 and knowing conduct. That is not true. 15:33:45

16 Obviously, that mens rea determination was affected by the 15:33:47
17 ineffective assistance of trial counsel. They don't 15:33:54
18 make the -- our contention is they don't make the intentional 15:33:57
19 and knowing finding when they find out Mr. Jones didn't do any 15:34:01
20 of this. 15:34:03

21 So you're not bound by anything in the verdicts of this 15:34:03
22 jury. That's the whole point of this proceeding. If the 15:34:08
23 ineffective assistance reached the case and we've demonstrated 15:34:11
24 that, then that verdict doesn't stand. 15:34:17

25 So I think, with that, Your Honor -- 15:34:20

1 THE COURT: What about the argument that Dr. Howard in 15:34:22
2 fact didn't testify inconsistently between Angela Gray's trial 15:34:26
3 and Mr. Jones' trial? 15:34:32

4 MR. SANDMAN: Well, I mean, Judge, I believe that I 15:34:35
5 demonstrated unequivocally when Dr. Howard was on the stand 15:34:37
6 that he changed his testimony. We cited in our briefs his 15:34:42
7 admission that his testimony was different. The lawyers are 15:34:45
8 arguing that his testimony wasn't different, Dr. Howard 15:34:51
9 testified that it was. That's in the record. And I can't give 15:34:55
10 you the pin cite to that. We've cited that in our briefs and 15:34:58
11 it's in the record and he acknowledged it. 15:35:01

12 And you can't testify at the Gray trial that the injury is 15:35:05
13 most consistent with 24 hours before death and then show up in 15:35:08
14 front of Mr. Jones' jury and you're asked the same question and 15:35:12
15 you gave a different answer. 15:35:16

16 Now, I understand the argument they're playing around with 15:35:17
17 days; that he always said, well, it could have been a day here 15:35:20
18 or two days there. But that's not the point. He said the 15:35:24
19 injury was most consistent at a time when my client didn't have 15:35:27
20 care and custody of that child. He said that both with respect 15:35:31
21 to the vaginal injury and the bowel injury. And then the scalp 15:35:34
22 injury, he changes that testimony at the Gray trial from 15:35:38
23 several days the wound would have been painful, to, no, it 15:35:43
24 happened Sunday afternoon. 15:35:46

25 So I understand people can read things differently, but I 15:35:48

1 don't think it's reasonable to suggest that his testimony was 15:35:56
2 not different and that it did not ultimately mislead Mr. Jones' 15:35:58
3 jury. 15:36:03

4 THE COURT: Thank you. 15:36:06

5 All right. I will take this matter under advisement. 15:36:08
6 I'll be in touch. You'll get my decision. Thank you. 15:36:14

7 MR. BRACCIO: Judge, do you want a copy of our 15:36:18
8 PowerPoint presentation? We sometimes file those with the 15:36:20
9 Court if it's helpful. 15:36:22

10 THE COURT: Well, you know, I think I am going to rely 15:36:25
11 on what was argued here today, because this hasn't really been 15:36:31
12 filed as an exhibit in this case. But, thank you. 15:36:36

13 (Proceedings concluded at 3:36 p.m.)

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C E R T I F I C A T E

I, A. TRACY JAMIESON, do hereby certify that I am duly appointed and qualified to act as an Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true and accurate transcript of the proceedings contained herein, held in the above-entitled cause on the date specified therein, and that said transcript was prepared by me.

Signed in Tucson, Arizona, on the 9th day of March, 2018.

s/A. Tracy Jamieson
A. Tracy Jamieson, RDR, CRR